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Supreme Court of the United States

October Term, 1976

No. 76-9541

CUYAHOGA COUNTY BAR ASSOCIATION, *et al.*,
Appellants,

vs.

SUPREME COURT OF OHIO, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants, the Cuyahoga County Bar Association and Crede Calhoun, appeal from a judgment of a three judge Court convened in the Southern District of Ohio dismissing the plaintiffs' complaint seeking determination of the unconstitutionality of Rule 7 and Rule 8, Section 9 of the Rules for the Government of the Bar adopted by the Supreme Court of Ohio and effective July 21, 1975, and seeking a permanent injunction against the enforcement of such rule.

OPINIONS BELOW

The opinion of the three judge Court dismissing the plaintiffs' complaint is not yet reported. A copy of that opinion is attached hereto as Appendix A.

A subsequent opinion of the three judge Court denying the motion of the plaintiffs to alter or amend the judgment of dismissal and to grant leave to file an amended complaint is not yet reported. A copy of that opinion is attached hereto as Appendix B.

A prior opinion by the Judge of the Northern District Court with which plaintiffs' action was originally filed dealing principally with the issue of venue is not reported and is attached hereto as Appendix C.

The opinion of the Judge of the Southern District Court determining cause for, and requesting convening of, a three judge Court is attached hereto as Appendix D.

JURISDICTION

This action, together with two additional consolidated actions, was brought by appellants for injunctive and declaratory relief pursuant to Title 42 United States Code Section 1983. Jurisdiction of the District Court was invoked pursuant to Title 28 United States Code Section 1343(3) and (4).

Appellants sought a declaration that Rule 7 and Rule 8, Section 9 of the Rules for the Government of the Bar of Ohio, imposing upon the members of the Bar of the State of Ohio an obligation to pay a substantial biennial fee to finance expenses incurred in the implementation of a non-judicial duty of the Supreme Court of Ohio and unrelated to the performance of any duty by any member of the Bar, or to the practice of law by any member of the Bar, and imposing upon each member of the Bar who fails

to pay such registration fee subjection to disciplinary action, including suspension of the right to continue in practice, is an unconstitutional denial to the plaintiffs and the entire class represented by the plaintiffs of the equal protection of the laws and of due process of law.

A three judge Court convened to consider federal constitutional issues raised by the complaint granted a motion of the defendants to dismiss the complaint, allegedly for want of a substantial federal constitutional question, and subsequently denied a motion of the plaintiffs to alter and amend the judgment and to accord leave by the filing of an amended complaint, to correct deficiencies in the complaint alleged to exist upon the dismissal of the complaint.

The judgment of dismissal was entered on October 13, 1976. The plaintiffs' motion to alter and amend the judgment, required to be filed and served not later than ten days thereafter was filed on October 26, 1976 and declared by the three judge Court to have been filed out of rule, notwithstanding the circumstance that the Court was closed and the motion to amend the judgment could not be filed on October 23rd, a Saturday, October 24th, a Sunday, and October 25th, a federal holiday. A copy of the judgment of dismissal is attached hereto as Appendix E.

Appellants' notice of appeal was filed on November 12, 1976. A copy of the notice of appeal is attached hereto as Appendix F.

The jurisdiction of the Supreme Court of the United States to hear this direct appeal is conferred by Title 28 United States Code Section 1253. *Ex parte Garland*, 71 U.S. 333, 378-79, 18 L. Ed. 366, 370; *Bradley v. Fisher*, 80 U.S. 356; *In re Murchison*, 349 U.S. 133, 75 Sup. Ct. 623.

THE RULES INVOLVED

The specific rules challenged are Rule 7 and Rule 8, Section 9 of the Rules for the Government of the Bar of Ohio, which read as follows:

"Registration of Attorneys

(1) Every attorney at law admitted to the practice of law in the State of Ohio shall file with the Clerk of this Court a Certificate of Registration together with a registration fee of Twenty-five ($25.00) Dollars per year payable biennially, upon a form to be furnished by the Clerk, said sum to be used for investigation of complaints of alleged misconduct pursuant to Section (3) of Rule V of these rules, alleged unauthorized practice of law and such other purposes deemed necessary by the Supreme Court of Ohio for the government of the bar of Ohio.

(2) The first Certificate of Registration shall be filed and the registration fee paid on or before November 1, 1975, and shall be for the period of January 1, 1976, to December 31, 1977.

(3) Thereafter, in each odd numbered year beginning in 1977, a new Certificate of Registration shall be filed and the registration fee paid on or before November 1 of that year.

(4) Persons admitted to the practice of law in this state between biennial registration dates shall file a Certificate of Registration at the time of admission and pay a fee of Fifty ($50.00) Dollars, unless such admission and registration occurs during the second year of the biennial registration period, in which event the fee shall be Twenty-Five ($25.00) Dollars.

(5) Every attorney admitted to the practice of law in another state but not in Ohio who performs legal services in this state solely for his employer as a full-time employee shall also file a Certificate of Registration and pay the fee as required by the foregoing sections of this Rule. Said registration shall

continue in force only so long as such attorney is so employed.

(6) An attorney who has not filed a Certificate of Registration and paid the required fee who practices law or holds himself out as authorized to practice law or who holds judicial office in this state shall be subject to disciplinary proceedings pursuant to Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

(7) Any attorney admitted to the practice of law in Ohio may acquire inactive status by making application to the Clerk for exemption from payment of the registration fee at the time of filing his Certificate of Registration. Such inactive attorney shall not be entitled to practice law nor hold himself out as authorized to practice law or hold judicial office in this state until such time as he requests and is granted reinstatement to active status."

And Rule 8, Section 9 of the Rules for the Government of the Bar of Ohio, which is as follows:

"Unauthorized Practice of Law

Section 9. All the expenses incurred by the Relator in connection with a complaint which is dismissed by the Board shall be the responsibility of the Relator. In all other cases, Relator's expenses, including reasonable attorney fees as approved by the Board, for preparation of and argument on complaints of unauthorized practice of law shall be provided from the registration fees collected pursuant to Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio."

QUESTIONS PRESENTED

1. Does the Supreme Court of Ohio violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution by requiring each member of the Bar of the State to pay a biennial fee of $50.00, a substantial portion of which fee is specifically allocated to the implementation of an assumed non-judicial duty of the Court wholly unrelated to the nature and performance of their duties as lawyers by members of the Bar?

2. Does the Supreme Court of Ohio violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution by causing members of the Bar who fail, or refuse, to pay such biennial fee to be subjected to disciplinary proceedings and possible suspension of their right to continue in the practice of law?

3. Does the Supreme Court of Ohio, by the adoption of such rules, in the face of urgent objections to both federal and state constitutional infirmities of the rules, and by widely publicizing to the general public the adoption of the rules and the objectives thereof, deprive the plaintiff Bar Association and all members of the Bar of a fair and impartial tribunal for the ultimate determination of federal and state constitutional questions sought to be raised; and does such denial of a fair and impartial state judicial tribunal violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

4. Upon the dismissal of a complaint for alleged failure to contain facts demonstrating the inability of plaintiffs to secure determination of substantial federal and state constitutional issues before an impartial state tribunal, may the District Court properly refuse to permit an amendment of the complaint to include substantial additional facts demonstrating the validity of such claim?

STATEMENT OF THE CASE

This is an appeal from a judgment of a three judge District Court for the Northern District of Ohio, Eastern Division, granting a motion to dismiss a class action complaint filed jointly by the Cuyahoga County Bar Association and one member of the Bar of the State of Ohio against the Supreme Court of Ohio, the Chief Justice and the six Associate Justices of said Court, for declaratory and injunctive relief seeking a determination that Rule 7 and Rule 8, Section 9 of the Rules of the defendant Court for the Government of the Bar are violative of the rights of the plaintiffs and of the class represented by the plaintiffs as being violative of the Fourteenth Amendment to the United States Constitution and of Title 42 U.S.C. Section 1983, and securing a permanent injunction against further enforcement of those rules.

By the filing of an amended complaint, there was a substitution of plaintiff Crede Calhoun for the original individual joint plaintiff Michael J. Noble.

The Cuyahoga County Bar Association is an independent professionally organized association of attorneys residing in, or having an office in, Cuyahoga County who are members in good standing of the Bar of the State of Ohio. Its membership totals approximately 2,000. Its stated objectives are:

> "To advance the system of jurisprudence; to assist in and to improve the administration of justice; to promote reforms in the law which are for the benefit of the courts of the legal profession and of the public; to foster and to strengthen the relationship among the members of the Bar, and between the Bench, the Bar and the public generally; to dignify and to enhance the position of the Bar and of its members as leaders in the community, as an organization to participate in civic matters whenever the Bar can con-

tribute to the general public welfare; and to aid and to stimulate all forms of legal education, and to cultivate cordial relations and acquaintance among the members of the Bar."

The Supreme Court of Ohio is the Ohio court of last resort. Article IV, Sec. 5(A) of the Ohio Constitution provides that:

"In addition to all other powers vested by this Article in the Supreme Court, the Supreme Court shall have general superintendence over all courts in the State. Such a general superintendence power shall be exercised by the Chief Justice in accordance with rules promulgated by the Supreme Court. **

"The Supreme Court shall prescribe rules governing practice and procedure in all courts of the State, which rules shall not abridge, enlarge or modify any substantive right."

Article IV, Sec. (2)(B)(g) of the Ohio Constitution provides:

"The Supreme Court shall have original jurisdiction in the following: Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law."

On May 19, 1975 the Supreme Court of Ohio caused the publication to be made to all members of the Bar of Ohio in the Ohio Bar, the official publication of the Ohio State Bar Association, a private professional association of the members of the Bar of Ohio, of a notice of a proposed amendment to Rule 5 and proposed adoption of Rules 7 and 8 of the Rules of the Supreme Court for the Government of the Bar.

Rule 5 relates to discipline of the members of the Bar of Ohio and provides the procedure for the hearing and determination of complaints against such members. The then proposed Rule 7, which is the subject matter of the

constitutional issues raised in this action, is entitled Registration of Attorneys, and the then proposed Rule 8 is entitled Unauthorized Practice of Law.

As then proposed, Rule 7 required each person admitted to the practice of law in this State to pay a biennial fee of $70.00 and to file a Certificate of Registration with the Clerk of the Supreme Court. Rule 7, as then proposed, also provided that:

"Any attorney who has not filed a Certificate of Registration and paid the required fee shall not be entitled to practice law or hold himself out as authorized to practice law or hold judicial office in this State."

Rule 8, Section 9, as then proposed, and subsequently adopted, relating to the unauthorized practice of law by laymen, provided:

"All the expenses incurred by the Relator in connection with a complaint which is dismissed by the Board shall be the responsibility of the Relator. In all other cases, Relator's expenses, including reasonable attorney fees as approved by the Board, for preparation of and argument on complaints of unauthorized practice of law shall be provided from the registration fees collected pursuant to Rule 7 of the Supreme Court Rules for the Government of the Bar of Ohio."

In response to a request for comments and objections, if any, by members of the Bar and Bar Associations throughout the State, the plaintiff Bar Association submitted to the Supreme Court strenuous objections to Rule 7 and Rule 8, Section 9 as being violative of the Federal and State Constitutions. Notwithstanding, the Rules were made effective July 21, 1975.

Prior to the effective date, the amount of the "registration fee" was reduced to $50.00, payable biennially in advance. Subsequently, on October 20, 1975, the Supreme Court of Ohio modified the provision of Rule 7, above

quoted, disqualifying every lawyer who had failed to pay the fee from continuing in the practice of law, and disqualifying every judge who had failed to pay the fee from continuing in judicial office.

In place thereof Rule 7, as presently in effect, provides that:

> "An attorney who has not filed a Certificate of Registration and paid the required fee, who practices law or holds himself out as authorized to practice law or who holds judicial office in this State, shall be subject to disciplinary proceedings pursuant to Rule 5 of the Supreme Court Rules for the Government of the Bar of Ohio."

The total number of members of the Bar who have registered with the Supreme Court and have paid the "registration fee" is 19,908. Accordingly, the total amount of funds accumulated by the payment of such fees is approximately One Million Dollars.

Although the fund in question constitutes a public fund and an amount which is intended to be expended for a public purpose, it has not been paid into the Treasury of the State of Ohio but remains under the control of the Clerk of the Supreme Court.

No budget for the expenditure of the funds on hand, either annually or biennially, has been published, and no such budget is known to exist, although all public funds payable to any agency of the State of Ohio are required to be paid to, and disbursed under the control of, the Treasurer of State pursuant to appropriation by the Legislature of the State of Ohio.

The complaint of the plaintiffs was filed in the Northern District, Eastern Division, of the United States District Court of Ohio. Prior thereto somewhat similar complaints had been filed in the Southern District of the same Court at Cincinnati and in the Southern District of the same Court at Columbus.

A motion to dismiss the complaint in this case was filed during the pendency of the action in the Northern District Court. Judge William K. Thomas of the Northern District declined to rule on the motion largely because of a possible conflict with rulings on similar motions filed in the Southern District cases.

Accordingly all three cases were consolidated in the Division of the Southern District Court at Columbus. A three judge court was ordered to be convened. Upon consideration by that Court of the defendants' motions to dismiss the then three consolidated actions, the motions were granted by the three judge Court, thus giving rise to this direct appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

COMPELLING PAYMENT BY PLAINTIFFS AND MEMBERS OF THE BAR OF OHIO SOLELY OF EXPENSES INCURRED IN ENDEAVORS BY THE DEFENDANTS TO SUPPRESS THE UNAUTHORIZED PRACTICE OF LAW BY LAYMEN VIOLATES THEIR DUE PROCESS AND EQUAL PROTECTION RIGHTS.

Rule 8 of the rules of the defendant Court creates an elaborate form of procedure intended to implement endeavors to suppress the practice of law by laymen.

Among the details of the rule is the creation of a Board of Commissioners on the Unauthorized Practice of Law, with detailed provisions for terms and appointments, defining the jurisdiction of the Board, providing for investigation by the Board, and referrals to local bar associations, receipts of complaints, and provisions for hearing of complaints or charges against laymen.

Section 9 of Rule 8 is the only section of a lengthy rule which provides for the source of the payment of ex-

penses to implement this non-judicial duty on the part of the defendant Court. As noted in section 9, quoted *supra*, page 9, in each instance in which a complaint is not dismissed by the Board all expenses "shall be provided from the registration fees collected pursuant to Rule 7 of the Supreme Court Rules for the Government of the Bar of Ohio".

Thus the members of the Bar of Ohio are under a mandatory duty to pay the expenses of the implementation of a non-judicial function of the defendant Court conferred upon that Court generally for the benefit of the citizens of the State, and no other source of funds for the carrying out of that duty exists. This is, in effect, taxation without representation.

In support of their motion to dismiss the complaint presented to the District Court, the defendants alleged in their brief that "the rules challenged herein are clearly within the power of the State of Ohio to regulate the practice of law and to protect the public from unethical practices by attorneys **", and chose to disregard the use of "registration funds" under Rule 8, section 9.

Again, in the defendant's brief in support of defendants' motion to dismiss, the defendants allege: "The rules challenged herein are intended to improve the existing procedures for professional discipline in order to protect the public from the misconduct of unethical lawyers and judges. Defendants submit that this is a legitimate and important state end and that the means employed are clearly reasonable, if not absolutely necessary, to achieve that end."

Again, the defendants omitted any reference to the consequences of Rule 8 section 9 with respect to the expenditure of the funds in question.

Ohio has an elaborate system, commencing with the appropriate provisions of the Ohio Constitution, to safe-

guard the raising of revenue followed by appropriations by the Legislature for the expenditure of all public monies.

Article XII Section 4 of the Constitution of Ohio provides that: "The General Assembly shall provide for raising revenue sufficient to defray the expenses of the State for each year, and also a sufficient sum to pay the interest on the State debt."

Article XII Section 5 of the Ohio Constitution provides that: "No tax shall be levied except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only it shall be applied."

The defendants have formally and directly conceded that the objective of Rule 7 is to raise revenue. In the defendants' brief in support of their motion to dismiss, it is asserted (page 9): "Where, as here, the law is designed to raise revenues to obtain its objective the States are accorded particular deference."

It is submitted, however, that no deference is to be accorded to a method of raising revenue undertaken by the judicial arm of a state government in violation of specific constitutional provisions.

Furthermore, on the same page of the defendants' brief in support of its motion to dismiss, it is asserted that: "The money derived from the registration fees is to be used to fund the operations of the office of the Disciplinary Council and to reimburse local bar associations for expenses incurred in processing complaints of unauthorized practice."

Rule 5 relates to disciplinary procedure governing the members of the Bar of Ohio. No claim of constitutional infirmity in that rule is here involved. Accordingly, Rule 5, being fifteen pages in length, is not here presented for review by this Court. The point that is of major significance here is that there is no provision in Rule 5, or elsewhere, directing that any portion of "the money derived

from the registration fees" is to be used to fund the operations of the office of the Disciplinary Council.

The single rule relating to the use of some One Million Dollars in funds already accumulated, and presently held by the defendants, is to be found in the expenditure thereof provided by Rule 8, section 9, relating to alleged misconduct of laymen.

There is no longer any doubt concerning the authority of this Court to invalidate a State Court rule which results in deprivation of federal constitutionally protected rights. *Mitchum v. Foster* (1972), 407 U.S. 225, 92 Sup. Ct. 2151; *NAACP v. Button* (1963), 371 U.S. 415, 83 Sup. Ct. 328; *Brotherhood of Railroad Trainmen v. Virginia* (1964), 377 U.S. 1, 84 Sup. Ct. 1113.

Although some of the cases cited are First Amendment cases, the protection afforded by Section 1983 cases is not so limited.

Pertinent to the defendants' endeavor to raise revenue is the statement of this Court in *United States of America v. Butler*, 297 U.S. 1, 56 Sup. Ct. 312:

> "A tax, in the general understanding of the term, and as used in the Constitution, signified an exaction for the support of the Government. The word has never been thought to connote the expropriation of money from one group for the benefit of another. *** The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality to bring about a desired end. To do this would be to shut our eyes to what all others than we can see and understand.

THE COMPULSORY SUBJECTION TO DISCIPLINARY PROCEEDINGS OF MEMBERS OF THE BAR OF OHIO FOR FAILURE OR REFUSAL TO PAY THE REGISTRATION FEE IMPOSED VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The opinion of the District Court upon the dismissal of the complaint in this cause commented: "Defendants rely upon the fact that every court which has considered the validity of a similar fee or assessment has upheld it", followed by a reference to a series of cases including only two from federal jurisdictions.

The District Court then asserted "To determine the substantiality of plaintiffs' claim, the Court must consider the applicability of the cases upon which defendants rely to each claim."

However, nowhere thereafter in the opinion of the District Court is there any analysis of such cases, nor any attempt to relate the decisions therein to the facts and the claims of the plaintiffs in the instant case.

The Tenth Circuit Court of Appeals in *May v. Supreme Court of Colorado* (1974), 508 F.2d 136 upheld the imposition of a registration fee, as did the Third Circuit Court (without opinion) in *Cantor v. Supreme Court of Pennsylvania* (1973), 487 F.2d 1394.

In both of these cases the funds received from the fees imposed were directed to be used for a purpose wholly distinct from the stated objection in the case at bar, and several of the cases cited and relied upon by the defendants are integration of the Bar cases, differing from, but largely affirmed by reliance upon, the decision of this Court in *Lathrop v. Donohue* (1961), 367 U.S. 820, 881 Sup. Ct. 1826.

In the case at bar the District Court noted in its opinion, referring to the defendants, that: "They rely prin-

cipally upon the decision in *Lathrop* (1961), 367 U.S. 820, wherein the Supreme Court of the United States upheld an annual $15.00 registration fee paid to the Wisconsin Integrated Bar."

The District Court subsequently noted, in its opinion, that the: "Supreme Court of the United States has not yet heard and determined a procedural due process challenge to a bar registration fee. The decisions in *Lathrop* and *In re Reed* (396 U.S. 274) do not foreclose plaintiffs' procedural due process claims."

The plaintiffs' due process claims herein presented are, however, not procedural but substantive, although the procedure by reason of which these claims arise was in violation of the Constitution of the State of Ohio.

In *Lathrop* the fee was imposed not by the judicial arm of the state government, but by the Integrated Bar of the State, composed of all admitted to the practice of law. *Lathrop* dealt largely, if not exclusively, with claims of constitutional infirmity based upon the right of association and the expenditure of plaintiff's funds for purposes with which he might not agree but which were within the objectives of the Integrated Bar of which he was a member.

The claims of the appellants in the instant case are clearly distinguishable. Rule 7 subjects the members of the Bar of Ohio to disciplinary procedure for failure to pay a registration fee when there has been no other purpose stated in any rule of the defendant Court other than the use of such funds in dealing with individuals who are not members of the Bar.

Clearly this involves a risk of suspension from the right to continue in the practice of law. This is a risk to the livelihood of the members of the bar which cannot be upheld under the decisions of this Court. *Ex parte Garland* (1866), 71 U.S. 333, 378-79; *Bradley v. Fisher* (1871), 80 U.S. 356.

The right of the members of the plaintiff Bar Association and of all members of the Bar of the State of Ohio which is granted protection by the Constitution of the United States is the right to continue in the practice of law in the absence of grounds of sufficient merit to support the existence of a compelling State interest justifying the suspension or removal of that right.

In *Bell v. Burson* (1971), 402 U.S. 535, 91 Sup. Ct. 1586, this Court dealt with another form of license also involving an intimate relationship with the right and opportunity to earn a living. Although *Bell* involved a procedural due process issue, the statement of this Court in a unanimous opinion regarding the constitutional safeguards of such a license are directly applicable:

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves State action that adjudicates important interests of the licensees."

And:

> "** relevant constitutional restraints limit State power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege' ", citing numerous authorities.

Where numerous other methods of collection of a so called "registration fee" are available, as for example proceedings in contempt, there is no compelling State interest justifying subjection of the members of the Bar to disciplinary proceedings and possible suspension or disbarment for non-payment of such "fee."

In its opinion, the District Court stated: "In short, plaintiffs cannot succeed in their substantive due process claim unless they show that there is no rational connection between Rule 7 and defendants' interest in regulating the Bar ** and the registration fee is intended to generate a fund to finance the accomplishment of that end."

In making this pronouncement, the District Court completely overlooked the fact heretofore noted that the only rule adopted by the defendant Court for the use of the fund accumulated is to be found in Rule 8 Section 9, which is in no way related to the defendants' interest "in regulating the Bar" or the conduct of the members of the Bar.

The District Court further overlooked the fact that the payment required in this case be made by all members of the Bar, and designated as a "registration fee", is not in fact a registration fee at all but is a payment intended to raise revenue for purposes wholly and completely apart from the registration with the Court of members of the Bar.

THE SUPREME COURT OF OHIO IS NOT A FAIR AND IMPARTIAL TRIBUNAL FOR THE ULTIMATE DETERMINATION OF FEDERAL AND STATE CONSTITUTIONAL QUESTIONS RAISED, AND THE DENIAL OF A FAIR AND IMPARTIAL STATE JUDICIAL TRIBUNAL FOR THE DETERMINATION THEREOF VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The complaint alleges the complete absence of a fair and impartial state tribunal for the determination of substantial federal and state constitutional questions raised herein. Plaintiffs' claims with reference to the absence of a fair and impartial State judicial tribunal are assuredly not based upon the imposition by the defendants of a registration fee, which is clearly within defendants' authority under the Ohio Constitution.

On the contrary, the absence of a fair and impartial tribunal resulted from the fact that the alleged fee imposed is intended for the purpose of raising revenue, as admitted by the defendants in the District Court, and from numerous circumstances surrounding the adoption of the rules

in question and resulting from their enforcement, all set forth in the proffered amendment to the complaint. As averred in the amendment to the complaint proffered in the District Court, defendants have accumulated a fund of approximately One Million Dollars which is maintained under their sole control and which was raised with the knowledge of the clear violation of the constitutional authority reposed solely in the State Legislature by the Ohio Constitution.

In *Henry v. State of Mississippi* (1965), 379 U.S. 443, 85 Sup. Ct. 564, this Court stated in its opinion:

> "Accordingly, we have consistently held that the question of when and how defaults in compliance with State procedural rules can preclude our consideration of a federal question is itself a federal question."

It is submitted that default by the highest judicial tribunal of the State in compliance with the constitutional requirements of that state, in accordance with the same principle, "is itself a federal question".

The District Court did not confront these claims of plaintiffs but instead declared that: "The mere fact that it was the Supreme Court of Ohio that imposed the registration fee does not render that Court a biased forum for the determination of whether or not an attorney should be disciplined for failure to pay the fee. Likewise, the Supreme Court's control over the investigation and prosecution of disciplinary charges does not render it an inappropriate tribunal."

No other reference is made in the opinion to the contention of the plaintiffs that the Supreme Court of Ohio is not a fair and impartial tribunal to determine Federal and State constitutional issues raised by its arrogation of power in clear violation of its constitutional jurisdiction and power. Plaintiffs nowhere claim that the Supreme Court of Ohio is not a fair and impartial tribunal "for the

determination of whether or not an attorney should be disciplined for failure to pay the fee."

In rejecting out of hand the issue of the absence of a fair and impartial judicial tribunal, the District Court asserted its reliance upon the decisions of this Court in *Withrow v. Larkin* (1975), 95 Sup. Ct. 1456, and in *Hortonville Joint School District #1 v. Hortonville Educational Association* (1975), 96 Sup. Ct. 1.

Nothing in the opinion of the reported decision of this Court in *Hortonville* appears to touch in the slightest upon the issues raised by plaintiffs and *Withrow* dealt solely with the frequently raised issue of the unification of administrative, investigative and semijudicial functions combined in an administrative agency. The Federal Constitutional necessity of an impartial tribunal was heavily stressed by this Court in *In re Murchison* (1955), 349 U.S. 133, 75 Sup. Ct. 623.

In view of the facts set forth in the proposed amendment to the complaint, attached hereto as Appendix G, the following statements of this Court in *Murchison* are particularly appropriate:

> "A fair trial and a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.***
>
> "But to perform its high function in the best way justice must satisfy the appearance of justice. *Offutt v. United States* (1954), 348 U.S. 11, 75 Sup. Ct. 11."

Prior to rejecting plaintiffs' claim of the absence of impartiality, the District Court had reasonably and properly pointed out that: "There is, furthermore, a presumption in favor of the honesty and integrity of the decision maker, and plaintiffs have a heavy burden of showing substantial risk of actual bias."

After recognizing the existence of "a heavy burden" of proof upon the plaintiffs, the District Court proceeded to dismiss the complaint without affording the plaintiffs any opportunity to sustain that burden of proof.

The defendants have asserted in their brief filed in support of defendants' motion to dismiss the complaint in this case that: "The adoption of the rule itself by the Supreme Court, which is the final authority on its validity under the State Constitution, is one indication of its validity."

By that statement, any claim to an arguable impartiality to decide substantial federal and state constitutional questions herein involved is dissipated.

Perhaps no court has stated the principle more succinctly than the Supreme Court of South Dakota in *McCoy v. Handlin*, 35 S.D. 487, 153 N.W. 361, wherein the Court said:

> "With the maxim that 'no man should be adjudged in his own cause' we take no issue. The law should never permit one to have the power, and therefore should never impose upon one the duty, of determining an issue wherein he is materially interested.
>
> "Judges are but human and, like their fellow mortals, possessed of human frailties; like others, their judgments are liable to be warped and twisted, either consciously or unconsciously, through the influence of self-interest."

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND ITS COMPLAINT, FOLLOWING DISMISSAL THEREOF, BY ADDING NUMEROUS ADDITIONAL FACTS DEMONSTRATING THE VALIDITY OF ITS CLAIM WITH RESPECT TO THE ABSENCE OF A FAIR AND IMPARTIAL STATE JUDICIAL TRIBUNAL.

The proposed amendment of paragraph 34 of the complaint herein is attached as Appendix G. Numbered paragraph 34 of the amended complaint submitted for filing contains eight paragraphs setting forth facts on the basis of which such absence of an impartial tribunal clearly appears. Many of these facts have been discussed, supra, in dealing with this issue.

Emphasis cannot fail to be placed upon the following allegations in the proposed amendment:

> "Prior to the adoption by the defendants of Rule 7, the defendants caused and instituted widespread publicity not only among the members of the Bar, but to the citizens generally of the State of Ohio, declaring the purpose and the intent of the defendants in raising revenue and the objectives of their proposed enforcement of the rule and the use of the funds received.
>
> "Any determination now or hereafter by the defendants that they in fact had no power or authority to undertake the acts which they have done, or any acknowledgment that such facts were in violation of the power and authority reposed in the defendants under the Constitution of Ohio, would, in the light of the foregoing, constitute a public embarrassment to the Court, and cannot reasonably constitute that Court as an objective and impartial tribunal in the disposition of important constitutional issues presented."

The further fact of significance in establishing the lack of impartiality of the defendant Court, as demonstrated in this brief by the history of its adoption of the rules in question, results from its determination of the constitutional

questions involved, ex parte, over the known objections to it by the plaintiffs.

This Court has well noted in *Conley v. Gibson* (1957), 355 U.S. 41, 78 Sup. Ct. 99, headnote 10:

> "Under the Federal Rules, the purpose of pleading is to facilitate a proper decision on the merits. Federal Rules Civil Procedure Rules 8(A)(2)(f), 12 (C), (E), (F), 15, 16, 26-37, 56, 28 USCA."
>
> "Abuse of discretion for trial court to deny leave to amend on granting motion to dismiss: United Steelworkers of America, AFL-CIO vs. Mesker Bros. Industries, Inc. (CA7th, 1972) 457 F2d 91, citing Treatise, 16 FRServ2d 204; Lemmon vs. Cedar Point Inc. (CA6th, 1969) 406 F2d 94; Boyce vs. Anderson (CA9th, 1968) 405 F2d 605; Ballou vs. General Elec. Co. (CA1st, 1968) 393 F2d 398, 12 FRServ2d 15a.24, Case 1; Developers Small Business Inv. Corp. vs. Hoeckle (CA9th, 1968) 395 F2d80, 12 FRServ2d 15a.24, Case 2; Austin vs. Home of Vision, Inc. (CA7th, 1967) 385 F2d 171, 11 FRServ2d 15a.24, Case 2; Klebanow vs. New York Produce Exchange (CA2d, 1965) 344 F2d 294, 9 FRServ2d 17b.3, Case 1 (citing Treatise); Martin vs. Ethyl Corp. (CA5th, 1965) 341 F2d 1 (citing Treatise); Bertucelli vs. Carreras (CA9th, 1972) 467 F2d 214, 16 FRServ2d 393, (citing Treatise); West Augusta Historical & Genealogical Society vs. Urban Renewal Auth. of Parkersburg, Inc. (CA4th, 1974) __F2d__, 18 FRServ2d 32; Montgomery Ward & Co. vs. Robert Cagle Bldg. Co. (SDTex 1967) 265 F Supp 469."

The denial of plaintiffs' motion to amend the District Court's judgment and to grant leave to file an amended complaint becomes an even more egregious error in this case, in the light of the statement by the District Court that the plaintiffs "have a heavy burden of proof" to establish the lack of an impartial State tribunal, and then followed by a denial to the plaintiffs of any right to fulfill that burden by either proof or averment.

CONCLUSION

The substantial federal constitutional questions raised herein affect not only the members of the Bar of Ohio, but of every State. "Raising of revenue" is an objective of government which can be accomplished in this country only by the appropriate legislative authority within whose exclusive orbit this duty falls.

The purpose of the imposition of a "fee" is, and must be, intimately related to a specific purpose for which the fee is imposed. When the purpose of the imposition of a fee is concededly to raise revenue, the designation of that imposition as a fee does not disguise the fact that it constitutes a tax.

While the amount and the nature of a tax may, in some of its aspects, be a political question, the notion that the Supreme Court of any state can arrogate to itself, in defiance of state constitutional authority, the power to impose a tax for any purpose, no matter how beneficial, raises a federal constitutional issue of great magnitude.

When the imposition of that tax is accompanied by the threat of action which may be taken by the authority imposing the tax to interfere with, or to destroy, the livelihood of an individual who fails to pay the tax so imposed, an additional federal constitutional question of high magnitude is involved.

By the imposition of that tax, in the guise of a "registration fee" and the accumulation of a fund of approximately One Million Dollars, by arrogating unto itself the power to raise revenue to implement a non-judicial duty of the Court, the Ohio Supreme Court can no longer function as the fair and impartial tribunal required by the Due Process Clause of the Fourteenth Amendment to determine the legality of its arrogation of such power, and to determine substantial federal and state constitutional questions

arising from its adoption and enforcement of the rules in question.

The impartiality of a judicial tribunal results not only from what it does but from the manner in which its acts are performed. To determine, among other things, the validity of its own acts, the Supreme Court of Ohio must necessarily be a party to any litigation seeking the resolution of the federal and state constitutional questions raised. It is elementary due process that no court can be a judge of its own cause.

The issues presented by this appeal are substantial, of nationwide importance, and require appropriate action by this Court at this stage of the proceeding directing their resolution by the District Court.

Respectfully submitted,

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Attorney for Appellants

APPENDIX A

Opinion of the District Court

(Filed October 1, 1976)

Nos. C-2-75-743, C-2-75-751, C-2-76-309

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL S. BUSCHBACHER, *et al.*,
Plaintiffs,

vs.

SUPREME COURT OF OHIO, *et al.*,
Defendants.

OPINION

Before John W. Peck, Circuit Judge and Joseph P. Kinneary and David S. Porter, District Judges.

Kinneary, District Judge. Plaintiffs in these actions assert the unconstitutionality of Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio which requires practicing attorneys to pay a biennial $50.00 registration fee used to maintain a fund for the investigation of professional misconduct. The claims for relief are alleged to arise under 42 U.S.C. §1983, and this Court has jurisdiction under 28 U.S.C. §1343(3), (4). On July 9, 1976, a three judge court was convened pursuant to 28 U.S.C. §§2281, 2284, to determine the issues presented in these actions.

This matter is now before the Court on the motions of the defendants to dismiss the complaints.

Plaintiffs in these three cases are Michael S. Buschbacher, Thomas A. Schaffer, Daniel D. Connor, and Crede C. Calhoun, all attorneys admitted to the practice of law in Ohio, and the Cuyahoga County Bar Association, a nonprofit corporation organized under the laws of the State of Ohio.

Defendants are the Supreme Court of Ohio, Chief Justice C. William O'Neill, and the associate justices of the Supreme Court of Ohio.

Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio requires attorneys to register biennially with the Clerk of the Supreme Court of Ohio and to pay a registration fee of $50.00. If an attorney fails to register and pay the fee, he is not "entitled to practice law or hold himself out as authorized to practice law or hold judicial office" in Ohio. Rule VII (6); Rule VIII. The fund generated by the registration fee is used to pay the expenses of the Board of Commissioners of the Unathorized Practice of Law and the Grievance Committees of local bar associations.

The complaints allege substantially identical claims for relief. Plaintiffs maintain that Rule VII deprives them of procedural and substantive due process rights, denies them equal protection of the law and interferes with their freedom to associate with other attorneys. Plaintiffs further contend that the Supreme Court of Ohio acted in contravention of state law in promulgating Rule VII. Finally, plaintiffs in C-2-75-743 allege that Article IV, Section 5 of the Ohio Constitution is void for vagueness. Each of these claims for relief will be considered below.

Procedural Due Process

Plaintiffs allege that Rule VII violates the due process clause both because it provides no notice that failure to

pay the registration fee will automatically result in an attorney's suspension, and because there is no provision for a hearing. Further, plaintiffs contend that if a hearing is in fact held, there is ultimately no fair and impartial tribunal within the state, since the Supreme Court of Ohio, the body adopting the rule and establishing its enforcement machinery, is the ultimate decision-maker.

Plaintiffs have no standing to assert the notice claim. At the time the suit was filed and the causes of action are alleged to have arisen, each plaintiff knew of his obligation to pay the registration fee and the consequences of nonpayment. Plaintiff Cuyahoga County Bar Association alleges neither that any of its members were without notice of Rule VII nor that any of its members have acted to their detriment. Consequently, there is no case or controversy between plaintiffs and defendants with respect to the question of notice. *See Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Plaintiffs' contention that the Rule denies them their due process right to a hearing is without merit. Rule V of the Supreme Court Rules for the Government of the Bar of Ohio provides for notice and hearing prior to suspension or disbarment from the practice of law and the Constitution does not require a hearing prior to the act which gives rise to the disbarment proceeding.

Plaintiffs further argue that they are in any event denied a fair hearing under Rule V because the Supreme Court of Ohio, the ultimate decision-maker, has an interest in maintaining and managing the fund created by the operation of its own Rule VII. While it is true that a fair and impartial decision-maker is required when interests afforded procedural protection by the due process clause are at stake, that decision-maker need not be devoid of all possible bias. There is, furthermore, a presumption in favor of the honesty and integrity of the decision-maker,

and plaintiffs have a heavy burden of showing a substantial risk of actual bias. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

In this country, state supreme courts are generally charged with the responsibility of establishing and administering disciplinary rules for the regulation of the practice of law. Furthermore, it is normal for state supreme courts to assess fees in order to effectuate the administration of that responsibility. *See e.g. May v. Supreme Court of Colorado*, 508 F.2d 136 (10th Cir. 1974); *Cantor v. Supreme Court of Pennsylvania*, 353 F.Supp. 1307 (E.D. Pa. 1973) *affirmed*, 487 F.2d 1394 (3d Cir. 1973); *Berberian v. Rhode Island Bar Association*, No. 74-1030 (1st Cir. April 3, 1974) (unreported decision); *In re Reed*, 257 A.2d 382 (Del. 1969); *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. S. Ct. 1949); *Wallace v. Wallace*, 225 Ga. 102, 166 S.E.2d 718, 723-25 (1969); *In re Unification of the Bar of Hawaii*, 432 P.2d 887 (Haw. 1967); *Ayers v. Hadaway*, 303 Mich. 589, 6 N.W.2d 905, 907-08 (1942); *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973); *Application of President of Montana Bar Association*, 518 P.2d 32 (Mont. 1974); *In re Platz*, 60 Nev. 296, 108 P.2d 858, 864 (1940); *In re Unification of New Hampshire Bar*, 248 A.2d 709 (N.H. 1968) *In re Gibson*, 4 P.2d 643, 649 (N. Mex. 1931); *Sweeney v. Cannon*, 380 N.Y.2d 633, 282 N.E.2d 332 (1972); *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 95 P.2d 113 (1939); *Bennett v. Oregon State Bar*, 470 P.2d 945 (Ore. 1970). The mere fact that it was the Supreme Court of Ohio that imposed the registration fee does not render that court a biased forum for the determination of whether or not an attorney should be disciplined for failure to pay the fee. Likewise, the Supreme Court's control over the investigation and prosecution of disciplinary charges does not render it an inappropriate tribunal.

In reaching this conclusion, this Court is guided by the decisions of the Supreme Court of the United States in *Withrow v. Larkin, supra*, where a state medical board which combined investigatory and adjudicatory functions was held to be an impartial tribunal and in *Hortonville Joint School District No. 1 v. Hortonville Education Association*, ___ *U.S.* ___ (June 17, 1976), in which a school board embroiled in a dispute with a teacher's association was held to be a fair tribunal for the determination of whether or not a teacher should be discharged. The Court is therefore of the opinion that the Supreme Court of Ohio is a fair and impartial tribunal to finally adjudicate disciplinary action taken under Rule V for failure to pay the fee required by Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio.

Finally, plaintiffs argue that the methods employed by the Supreme Court of Ohio in adopting Rule VII did not comport with due process. Plaintiffs allege, however, no facts in support of their contention and this Court is of the opinion that the Supreme Court of Ohio duly followed established procedures for the adoption of a Rule for the Government of the Bar of Ohio. The due process clause requires no more. *Cf. In re Reed, supra.*

Substantive Due Process

Plaintiffs assert that they have been granted a right to practice law that cannot be infringed upon or denied to them by the imposition of a registration fee designed to generate financing for the policing of the profession. Relying upon *Bradley v. Fisher*, 80 U.S. 335 (1871), *Ex parte Bradley*, 74 U.S. 364 (1868), and *Ex parte Garland*, 71 U.S. 333 (1866), plaintiffs argue that they cannot be deprived of the right to practice law except for moral or professional delinquency.

These cases are inapposite to the proposition for which they are cited. The *Bradley* cases involved the disbarment by a federal court of the attorney representing John H. Surratt in his trial for the murder of President Lincoln. The attorney, Bradley, was alleged to have rudely accosted and threatened the trial judge. In *Ex parte Bradley, supra,* the Supreme Court held that although the courts have the undoubted power to punish attorneys for misconduct, an attorney cannot be disbarred without notice and an opportunity to defend. 74 U.S. at 374. The Supreme Court held in *Bradley v. Fisher, supra*, that the trial judge was immune from suit by Bradley. *Ex parte Garland* was a suit by an attorney for his readmission to the practice of law in a federal court without taking an oath that he had not held an office under the Confederate government. Garland had held a Confederate office, but after the Civil War he had received a Presidential pardon. In the course of holding that the oath was an *ex post facto* law inflicting punishment for treason, the Supreme Court stated that an attorney can be deprived of the right to practice his profession only for "moral or professional delinquency." 71 U.S. at 379. These cases do not, in the view of this Court, stand for the proposition that courts are prohibited from establishing reasonable rules for the governance of the bar, including the assessment of a fee in order to effectuate those rules. In any event, failure to comply with reasonable rules for the governance of the bar is surely an act of professional delinquency.

At base, plaintiffs argue that once they are admitted to the bar, the Supreme Court of Ohio can adopt no rule the noncompliance with which would deprive them of the right to practice law. This proposition is supported by neither logic nor case law and the constitutionality of an assessment imposed for the first time subsequent to an

attorney's admission to the bar is beyond question. *See In re Reed,* 396 U.S. 274 (1970); *Lathrop v. Donohue,* 367 U.S. 820 (1961). Thus, plaintiffs' argument that the registration fee is unconstitutional because it was imposed as a condition of practicing law subsequent to their admission to the bar is without merit.

In short, plaintiffs cannot succeed in their substantive due process claim unless they show that there is no rational connection between Rule VII and defendants' interest in regulating the bar. *See Kelley v. Johnson,* 44 U.S.L.W. 4469, 4472 (April 5, 1976); *North Dakota State Board of Pharmacy v. Snyder's Drug Store,* 414 U.S. 156, 164-67 (1973); *Ferguson v. Skrupa,* 372 U.S. 726, 730-32 (1963). The Supreme Court of Ohio has the duty to limit the practice of law to those professionally and morally qualified, and the registration fee is intended to generate a fund to finance the accomplishment of that end. There is, consequently, a rational relationship between the fee and the Supreme Court's duty of regulating the practice of law.

Equal Protection

Attorneys employed by the federal government are not required to pay a registration fee and plaintiffs contend that this exception to the application of the operation of Rule VII deprives them of the equal protection of the laws. In the area of social and economic welfare, discrimination by the state does not violate the equal protection clause if that discrimination is reasonably related to a legitimate state purpose. *Mourning v. Family Publications Services, Inc.,* 411 U.S. 356, 369 (1973). Defendants suggest that the exemption of federal employees promotes the legitimate state purposes of maintaining harmonious relations and of avoiding needless friction between the state and federal governments. *Cf. Railroad Commission v.*

Pullman Company, 312 U.S. 496, 500-01 (1941). Plaintiffs advance no countervailing argument and this Court concludes that the Rule VII exemption is rationally related to a legitimate state purpose.

Void For Vagueness

Plaintiffs in C-2-75-743 contend that Article IV, Section 5 of the Ohio Constitution is void for vagueness. That portion of the Ohio Constitution provides in part that

> |t|he Supreme Court . . . shall make rules governing the admission to the practice of law and discipline of persons so admitted . . . .

Because they contain broad grants of authority, constitutions employ general language and are not intended to be narrowly drawn codes. There is nothing vague about Article IV, Section 5. It empowers[1] the Supreme Court of Ohio to regulate admission to the bar and to administer discipline, and courts generally have assumed such authority with or without constitutional sanction. *See e.g. Ex parte Garland, supra*, 71 U.S. at 379; *Ex parte Bradley, supra*, 74 U.S. at 374.

Rule VII itself is narrowly drawn and affords to plaintiffs all the protection mandated by the First and Fourteenth Amendments against overbroad restrictions on speech and association.

Freedom Of Association

Plaintiffs further contend that suspension for failure to pay the registration fee will result in an unconstitutional deprivation of the freedom to associate with fellow attorneys. Disbarment would, of course, terminate the privileges associated with the practice of law. However, the limitation of associational rights would flow, not from any constitutional infirmity in Rule VII, but rather from the attorney's own failure to comply with the Rules for the Government of the Bar of Ohio. Because Rule VII is constitutionally sound, plaintiffs have no claim for relief based on the First Amendment's protection of the right to freedom of association.

[1] The Supreme Court of Ohio has held that it has the inherent judicial authority to control admission to the bar and to discipline its members. *In re Nevius*, 174 Ohio St. 560, 562-63 (1963).

Pendent State Law Claim

Finally, plaintiffs allege that the adoption of Rule VII by the defendants is contrary to state law. This is a pendent claim, of course, which this Court may in its discretion refuse to consider. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Admission to the bar and discipline of attorneys are traditionally matters within the exclusive jurisdiction of the court of whose bar the attorney is a member. Each jurisdiction has its own rules and practices and for this Court to substitute its judgment for that of the Supreme Court of Ohio in a matter so intimately involving that court's authority and jurisdiction would be peculiarly inappropriate. Plaintiffs should seek resolution of their state law questions in the state forum.

APPENDIX B

Opinion and Order of the District Court

(Filed November 17, 1976)

C-2-75-743, C-2-75-751, C-2-76-309

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL S. BUSCHBACHER, *et al.*,
Plaintiffs,

vs.

SUPREME COURT OF OHIO, *et al.*,
Defendants.

OPINION AND ORDER

By an opinion and order issued earlier, this Court dismissed the complaints filed in these actions and judgment was entered on October 13, 1976. Subsequent to the entry of judgment, plaintiffs in two of the actions filed motions which are presently before the Court. Plaintiffs in C-2-75-743 have filed motions for reconsideration and for disqualification of every "Federal District Judge in Ohio" from hearing this action on the ground that, because federal employees are exempt from paying the filing fee imposed by Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio, all such judges are parties interested in the outcome of the litigation.

Upon consideration of plaintiffs' motion for reconsideration, and being fully informed, the Court determines

that the motion is without merit and it is therefore DENIED.

In their motion to disqualify, the plaintiffs in this action rely upon Title 28, United States Code, Section 455. Section 455(b) (4) provides that a judge shall disqualify himself when:

> [h]e knows that he . . . has a financial interest . . . or any other interest that could be substantially affected by the outcome of the proceeding . . . .

Because federal judges are not required to pay the filing fee in any event, it is the opinion of this Court that the outcome of these proceedings is a matter of financial indifference to any federal judge determining the issues presented in these actions. Further, the anticipation of possible future proceedings (as well as similarly possible constitutional issues), renders any arguable financial interest on the part of a federal judge far too speculative for consideration in the proceedings presently before this Court.

The Court therefore determines that the motion to disqualify, filed for the first time after judgment had been rendered in these actions, is without merit and it is hereby DENIED.

Plaintiffs in C-2-76-309 have filed a motion to alter or amend judgment and ask that they be granted leave to file a second amended complaint in which they may be permitted to elaborate upon their claim, raised in the original and in the amended complaint, that the plaintiffs are unable to obtain a fair and impartial tribunal within the judicial system of the State of Ohio to hear and to determine the state constitutional and statutory issues raised by them.

The Court first notes that plaintiffs' motion was not timely filed. Rule 59(e) of the Federal Rules of Civil Procedure provides that:

> [a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Judgment in this action was entered on October 13, 1976 and this motion was filed on October 26, 1976. The untimeliness of the motion alone, then, constitutes grounds for denial of that motion.

Further, this Court perceives no necessity for granting plaintiffs' motion for leave to file a second amended complaint, for this Court is of the opinion that the claim sought by plaintiffs to be raised in that complaint was determined, implicitly if not explicitly, in the Court's original opinion and order. Plaintiffs' claim that the adoption of Rule VII is contrary to Ohio law is a state law claim which this Court may in its discretion refuse to consider. The mere fact that plaintiffs believe that no Ohio court could impartially determine this purely state law question does not serve to transform that state claim into a federal claim, nor does it create in the federal judiciary an obligation to consider matters that federal courts would not otherwise consider.

WHEREUPON, the Court determines that the motions are without merit and they are therefore DENIED.

/s/ JOHN W. PECK
United States Circuit Judge

/s/ JOSEPH P. KINNEARY
United States District Judge

/s/ DAVID S. PORTER
United States District Judge

APPENDIX C

Memorandum and Order of the District Court

(Filed April 20, 1976)

No. C 75-1096

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE CUYAHOGA COUNTY BAR ASSOCIATION
and
MICHAEL J. NOBLE,
Plaintiffs,

THE SUPREME COURT OF OHIO, *et al.*,
Defendants.

MEMORANDUM AND ORDER

THOMAS, *J.*

Predicating the complaint upon 42 U.S.C. § 1983 (the federal Civil Rights Act of 1871), the Fourteenth Amendment to the United States Constitution, and the Constitution of the State of Ohio, the Cuyahoga County Bar Association, a nonprofit corporation, on behalf of its members, and Michael J. Noble, an attorney at law, on behalf of all similarly situated members of the Bar of the State of Ohio, sue the Ohio Supreme Court, C. William O'Neill, Chief Justice, and Thomas J. Herbert, J. J. P. Corrigan, Leonard J. Stern, Frank D. Celebrezze, and William B. Brown, Associate Justices of the Supreme

Court of Ohio. Resting jurisdiction of this court on 28 U.S.C. §§ 1343(3) and 1343(4) (granting federal jurisdiction in civil rights actions without reference to monetary consideration) and 28 U.S.C. § 1331 (federal action jurisdiction when the claim exceeds the value of $10,000), plaintiffs seek to enjoin the enforcement and declare unconstitutional Rule VII (effective July 21, 1975) and Rule VIII (effective January 1, 1976) of the Supreme Court Rules for the Government of the Bar of Ohio.

Count 1 of the complaint challenges the constitutionality of Rule VII, paragraph (1) of which provides:

> Every attorney at law admitted to the practice of law in the State of Ohio shall file with the Clerk of this Court a Certificate of Registration together with a registration fee of Twenty-five ($25.00) Dollars per year payable biennially, . . . said sum to be used for investigation of complaints of alleged misconduct pursuant to Rule V of these rules, alleged unauthorized practice of law and such other purposes deemed necessary by the Supreme Court of Ohio for the government of the bar of Ohio.

Count 2 of the complaint challenges Rule VIII, which creates "a Board of Commissioners on the Unauthorized Practice of Law," and by section 2 thus establishes the Board's jurisdiction:

> (A) The unauthorized practice of law is the rendering of legal services for others by anyone not registered under Rule VII of the Rules for the Government of the Bar of Ohio.
>
> (B) The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations concerning complaints of unauthorized practice of law.

Pursuant to Rule 12(b), Federal Rules of Civil Procedure, all defendants move the court

> . . . to dismiss this action on the grounds that there is improper venue; this Court lacks jurisdiction of the subject matter; and plaintiffs have failed to state a claim upon which relief may be granted.

Only the first branch of defendants' motion need be considered. For the reasons hereafter stated this court determines that venue for this action does not exist in this district. However, rather than dismiss the case, as requested by the defendants, the case is transferred to the United States District Court for the Southern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 1406(a). Two cases presenting issues identical with those contained in this action are now pending on the docket of Judge Joseph P. Kinneary in the Southern District of Ohio, Eastern Division.[1]

I.

Title 28 U.S.C. § 1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

O'Neill v. Battisti, 472 F.2d 789 (6 Cir. 1972), *cert. denied*, 411 U.S. 964 (1973), involved a petition for writ of mandamus or prohibition filed by the Chief Justice and the

---

[1] Cases were originally brought in both Columbus (Eastern Division) and Cincinnati (Western Division). Judge David S. Porter decided, however, that venue within the Southern District of Ohio was only proper in the Eastern Division. Accordingly, he transferred his case to Judge Kinneary in Columbus, Buschbacher, et al. v. Supreme Court of Ohio, No. C 2-75-743 (S.D. Ohio 1975). The case originally filed in Columbus with Judge Kinneary is styled Conner v. Supreme Court of Ohio, No. C 2-75-751 (S.D. Ohio). Inquiry reveals that these two cases present, among other issues, the same Fourteenth Amendment due process challenge to Rules VII and VIII as is presented in this case.

Associate Justices of the Supreme Court of Ohio against the Chief Judge of the United States District Court for the Northern District of Ohio. The Chief Judge had issued a restraining order against the Supreme Court of Ohio and its justices

> . . . restraining the Justices of the Supreme Court . . . from enforcing the Supreme Court's order of September 8, 1972, or from taking any further disciplinary action against Judge Heitzler [a judge of the domestic relations division of the Common Pleas Court of Hamilton County].

The court of appeals determined:

> It is clear that venue does not lie in the Northern District of Ohio in the action filed there by Judge Heitzler against the Justices of the Supreme Court of Ohio. Under 28 U.S.C. § 1391(b), a civil action must be brought in the judicial district where all the defendants reside or where the claim arose. The official residence of the Supreme Court of Ohio is in the place where it performs its official duties, that is. Columbus, the State Capital and the seat of State Government. Under Ohio law, regular sessions of the Supreme Court are held only in Columbus. See O.R.C. § 2503.33. Columbus is in the Southern District of Ohio.

Id. at 791. These pronouncements on the subject of proper venue of an action brought against the Supreme Court of Ohio go beyond the facts and circumstances of *O'Neill v. Battisti*. This court reads the court of appeals' pronouncements as holding that because the Supreme Court of Ohio performs its official duties only in Columbus, in the Southern District of Ohio, a cause of action against the Supreme Court of Ohio may only arise in the Southern District of Ohio.

Construing *O'Neill v. Battisti, supra,* as having this effect would permit this court to find lack of venue in this

court without more. However, the meaning of section 1391(b) will hereafter be examined in light of cases that involve claims against officials sued in their official capacity with such state of law thereafter applied to the circumstances of this case.

II.

In substance plaintiffs urge that the causes of action against the defendant Supreme Court of Ohio arise in the Northern District of Ohio because a failure of the attorney members of the class and plaintiff Noble to comply with Rule VII would deprive them of their right and opportunity to earn a living and to practice the legal profession in the Northern District of Ohio.

There are few cases on point construing the meaning of the phrase "the judicial district . . . in which the claim arose . . . ," added by Congress in 1966. For a discussion of the provision's obscurity, see 1 *Moore's Federal Practice* ¶ 0.142[5.-2] at 1423-35 (2d Ed. 1974). The court has been cited to or found three cases dealing with somewhat similar situations: *Kletschka v. Driver*, 411 F.2d 436 (2 Cir. 1966); *Weil v. New York State Dept. of Transp.*, 400 F.Supp. 1364 (S.D. N.Y. 1975); and *Iaquinta v. Sloan*, 350 F.Supp. 203 (N.D. W.Va. 1972).

Of these cases *Kletschka* and *Iaquinta* found venue proper in the district where the plaintiff resided and was affected by an administrative action, although the administrators sued lived in and issued the orders involved from offices located in different districts. However, the *Weil* case is most closely on point. There Weil, who apparently resided in New York City, sued the state transportation department to void his layoff, which had been accomplished pursuant to orders issued by officials who resided and had their offices in Albany. Utilizing a "weight of

the contacts" approach to decide where the cause of action arose, *Arnold v. Smith Motor Co.*, 389 F.Supp. 1020 (D. Iowa 1974); *Honda Associates, Inc. v. Nozawa Trading, Inc.*, 374 F.Supp. 886 (S.D. N.Y. 1974); *Moore's Federal Practice, supra,* at 1429-35, Judge Duffy in *Weil* held that venue was proper in the Northern District of New York and transferred the case thereto. He noted that:

> In a case involving the New York State Retirement System Judge Judd held:
>
> > |T|he locus of this action was Albany where the decision was made and implemented and not the various localities where retired persons received checks |through the mail|. *New York State Employees Retirement Association, et al v. New York State Employees Retirement System* (E.D. N.Y. 1973) 73 Civ. 1066.

400 F. Supp. at 1365.

An examination of the balance of contacts in this case reveals that the promulgation of the attorney registration rule (Rule VII of the Supreme Court Rules for the Government of the Bar) must be considered as having taken place in the Southern District of Ohio. Also any enforcement of the rule would be undertaken there.

The Board of Commissioners is not empowered by Rule VIII(2)(A) and (B), *supra,* to undertake disciplinary action. It can only "make findings and submit recommendations." The ultimate power to discipline is lodged in the Supreme Court itself, pursuant to the procedures set forth in Rule V of the Rules for the Government of the Bar. Thus any disciplinary action would occur in Columbus, even though investigation may be undertaken in other parts of the state. The only contact this case has with this district is that the individual plaintiff and class plaintiffs practice law here. Balancing this contact against the several contacts with the Southern District that go to the

basis of the claimed causes of action, it is concluded and determined that these claims arose in the Southern District and therefore venue lies there.

III.

As a final point common sense administration of the business of the federal courts justifies the transfer of this case to the Southern District (Eastern Division). There is undisputed venue in that district under section 1391(b) permitting Judge Kinneary to hear and determine the case filed on his docket, and the case divisionally transferred to his docket by Judge David S. Porter of the Southern District (Western Division). Those cases and the instant Cuyahoga County Bar Association case each present the same claimed Fourteenth Amendment issue of lack of due process. In these cases if the federal constitutional questions involving the state wide regulations are determined to be not insubstantial, a three-judge court will have to be convened to decide them. *Hagans v. Lavine*, 415 U.S. 528 (1974). Had this court found venue in the instant case, it is evident that the district judges might come to different conclusions on the substantiality issue, a consummation not devoutly to be wished. However, if both district courts were to find the federal questions are not insubstantial, then each district court would be required to request the convening of a three-judge court to rule on the issue that Rules VII and VIII be enjoined. The lack of judicial economy in convening two three-judge courts to hear and determine the same issue is evident to all. Not so evident but surely undesirable to the point of unseemliness would be the spectacle of possibly conflicting judgments between different three-judge federal courts in Ohio ruling on the claims in controversy between members of the Ohio bar and the Supreme Court of Ohio.

For the reasons stated in this opinion, this case will be transferred to Judge Kinneary in the Southern District of Ohio, Eastern Division, pursuant to the provisions of 28 U.S.C. § 1406(a).

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
United States District Judge

APPENDIX D

Opinion and Order of the District Court

(Filed July 1, 1976)

Civil Action C 2 75-743, C 2 75-751, C 2 76-309

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL S. BUSCHBACHER, *et al.*,
Plaintiffs,

vs.

THE SUPREME COURT OF OHIO, *et al.*,
Defendants.

OPINION AND ORDER

Plaintiffs challenge the constitutionality of a rule of the Supreme Court of Ohio which requires practicing attorneys to pay an annual registration fee to establish a fund for the investigation of professional misconduct. The claims for relief are alleged to arise under 42 U.S.C. §1983. The Court has jurisdiction under 28 U.S.C. §1343(3),(4).

Plaintiffs in these three cases are Michael S. Buschbacher, Thomas A. Schaffer, Daniel D. Connor, and Michael J. Noble, all attorneys admitted to the practice of law in Ohio, and the Cuyahoga County Bar Association, a nonprofit corporation organized under the laws of the State of Ohio.

Defendants are the Supreme Court of Ohio, Chief Justice C. William O'Neill, and the associate justices of the Supreme Court of Ohio.

Rule VII of the Supreme Court Rules for the Government of the Bar of Ohio requires attorneys to register biennially with the Clerk of the Supreme Court of Ohio and to pay an annual registration fee of $25.00. If an attorney does not register and pay the registration fee, he is not "entitled to practice law or hold himself out as authorized to practice law or hold judicial office" in Ohio. Rule VII (6); Rule VIII. The fund created by the registration fee is used to pay the expenses of the Board of Commissioners of the Unauthorized Practice of Law and the Grievance Committees of local bar associations.

Plaintiffs in Civ. No. C 2 75-743 move for the convening of a three-judge court to consider the constitutionality of Rules VII and VIII of the Supreme Court Rules for the Government of the Bar of Ohio. Although plaintiffs in Civ. Nos. 75-751 and 76-309 have not requested a three-judge court, this Court has the statutory duty to determine whether a three-judge court must be convened in those cases as well. *International News Distributors, Inc. v. Shriver*, 488 F.2d 1350, 1352 (6th Cir. 1973).

A three-judge court must be convened when a plaintiff seeks injunctive relief against the operation of a state statute. A judicial rule of state-wide application is considered a "statute" within the meaning of §2281. *Cantor v. Supreme Court of Pennsylvania*, 353 F.Supp. 1307, 1313 (E.D. Pa. 1973), *affirmed*, 487 F.2d 1394 (3rd Cir. 1973). But a three-judge court need not be convened if the constitutional claim is insubstantial. *Hagans v. Lavine*, 415 U.S. 528, 536-538 (1974). The test of the substantiality of a constitutional claim was stated by the Supreme Court of the United States in *Goosby v. Osser*, 409 U.S. 512, 518 (1973):

> claims are constitutionally insubstantial only if the prior decisions inescapably render the claim frivolous; previous decisions which merely render a claim of

> doubtful or questionable merit do not render them insubstantial for purposes of 28 U.S.C. §2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." [citations omitted]

Defendants—for whose benefit the three-judge court statutes were enacted—argue that a three-judge court should not be convened. They rely principally upon the decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961) wherein the Supreme Court of the United States upheld an annual $15.00 registration fee paid to the Wisconsin integrated bar. The petitioner Lathrop objected to paying the compulsory fee on the ground that it was used by the bar association to support political activities. The plurality decision in the Supreme Court held that on the facts presented the registration fee did not impinge upon his freedom of association. Justice Whittaker, concurring, believed that the state was constitutionally free to condition the "special privilege" of practicing law upon the payment of an annual $15.00 fee without regard to the effect upon members' associational rights.

Defendants also rely upon *In re Reed*, 396 U.S. 274 (1970) where the Supreme Court of the United States dismissed an appeal from the Supreme Court of Delaware for want of a substantial federal question. The Supreme Court of Delaware had held that its rule requiring attorneys to pay an annual assessment of $10.00 to $100.00 to a client's security trust fund as a condition to practice law was not unconstitutional. The Supreme Court of Delaware noted that the fee was reasonable; but the Court did not discuss substantive or procedural due process aspects of the fee.

Additionally, defendants rely upon the fact that every court which has considered the validity of a similar fee or assessment has upheld it. See, *e.g.*, *May v. Supreme Court of Colorado*, 508 F.2d 136 (10th Cir. 1974); *Cantor v. Supreme Court of Pennsylvania, supra; Berberian v. Rhode Island Bar Association*, No. 74-1030 (1st Cir. April 3, 1974) (unreported decision); *In re Reed*, 257 A.2d 382 (Del. S. Ct. 1969); *Petition of Florida State Bar Association*, 40 So. 2d 902 (Fla. S. Ct. 1949); *Wallace v. Wallace*, 225 Ga. 102, 166 SE 2d 718, 723-725 (1969); *In re Unification of the Bar of Hawaii*, 432 P.2d 887 (Haw. S. Ct. 1967); *Ayers v. Hadaway*, 303 Mich. 589, 6 NW 2d 905, 907-908 (1942); *Sharood v. Hatfield*, 296 Minn. 416, 210 NW 2d 275 (1973); *Application of President of Montana Bar Association*, 518 P.2d 32 (Mont. S. Ct. 1974); *In re Platz*, 60 Nev. 296, 108 P.2d 858, 864 (1940); *In re Unification of New Hampshire Bar*, 248 A.2d 709 (N. H. S. Ct. 1968); *In re Gibson*, 4 P.2d 643, 649 (N. Mex. S. Ct. 1931); *Sweeney v. Cannon*, 30 N.Y. 2d 633, 282 NE 2d 332 (1972); *In re Integration of State Bar of Oklahoma*, 185 Okla. 505, 95 P.2d 113 (1939); *Bennett v. Oregon State Bar*, 470 P.2d 945 (Ore. S. Ct. 1970).

To determine the substantiality of plaintiff's claims, the Court must consider the applicability of the cases upon which defendants rely to each claim. The complaints in each of the three cases allege similar causes of action. The Court will not consider the complaints separately, but will discuss each of the general claims for relief below.

PROCEDURAL DUE PROCESS

Plaintiffs allege that Rule VII violates the due process clause because it does not provide for notice to an attorney that failure to pay the registration fee will automatically result in his suspension. Further, plaintiffs contend that

Rule VII violates the due process clause because there is no provision for a hearing; and, if a hearing is held, there is ultimately no fair and impartial tribunal because the Supreme Court of Ohio, the body adopting the rule, sets up the enforcement machinery and is the ultimate decision maker.

The Court believes the notice claim to be clearly insubstantial. First, plaintiffs do not have standing to challenge the alleged lack of notice of an attorney's duty to register with the Clerk of the Supreme Court of Ohio and pay the annual registration fee. Plaintiffs, in fact, have notice of the rule; therefore, they are not proper representatives of the class. *See, Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974). Second, Rule V of the Supreme Court Rules for the Government of the Bar of Ohio provides for notice and hearing prior to suspension or disbarment from the practice of law. Similarly, the allegation of a denial of a right to a hearing is not supported by the facts because Rule V provides for a hearing prior to suspension or disbarment.

It appears doubtful that plaintiffs could win on the merits of the fair and impartial tribunal claim for relief, see, *Withrow v. Larkin*, 421 U.S. 35 (1975); *Hortonville Joint School District No. 1 v. Hortonville Education Association*, ___ U.S. ___ (June 17, 1976); however, there has been no ruling of the United States Supreme Court which would absolutely foreclose the claim.

Plaintiffs also contend that Rule VII was adopted by the Supreme Court of Ohio in violation of the authority conferred on it by the Constitution and laws of Ohio and without an opportunity for an adversary proceeding to determine the existence of their power and authority to enact and enforce it. Although this claim may ultimately prove not to state a federal question, construed most favorably to plaintiffs it would appear to state a claim that

the adoption process for the rule did not comport with procedural due process. *Cf. In re Reed*, 257 A.2d *supra*.

The Supreme Court of the United States has not yet heard and determined a procedural due process challenge to a bar registration fee. The decisions in *Lathrop* and *In re Reed* do not foreclose plaintiffs' procedural due process claims.

SUBSTANTIVE DUE PROCESS

Plaintiffs contend that although they are fully qualified morally and professionally to practice law, the operation of Rule VII will deprive them of an opportunity to earn a living and continue to practice their profession. To succeed on a substantive due process claim the plaintiff must demonstrate that there is no rational connection between the rule and defendant's interest in regulating the Bar. *See, Kelley v. Johnson*, 44 U.S. USLW 4469, 4472 (U.S. S. Ct. April 5, 1976); *North Dakota State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156, 164-167 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 730-732 (1963); *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). It is very doubtful that plaintiffs can succeed in proving the irrationality of Rule VII, but the Court cannot say that prior decisions of the Supreme Court foreclose the claim.

EQUAL PROTECTION

Attorneys employed by the federal government are not required to pay a registration fee. Plaintiffs contend that the fact that defendants require them to pay the fee, and not employees of the federal government, deprives them of the equal protection of the laws.

If the rule is reasonably related to a legitimate state purpose, it survives constitutional challenge. *Mourney v. Family Publications Service, Inc.*, 411 U.S. 356, 359

(1973). Defendant suggests that such a state purpose is the promotion of harmonious relations and the avoidance of needless friction between state and federal governments. *Cf. Railroad Commission v. Pullman Company*, 312 U.S. 496, 500-501 (1941). Again, it is doubtful that plaintiffs can succeed on the merits of the claim, but no decision of the Supreme Court of the United States forecloses the claim.

OTHER CLAIMS

Plaintiffs also contend that suspension from the practice of law would deprive them of the right to associate with other attorneys. This claim standing alone raises no substantial constitutional question. There is no absolute right to practice law; and if the state determines that a person is no longer qualified to practice law, he loses the privileges associated with practicing law. The constitutional questions presented are those of due process and equal protection. If the state has the constitutional authority to require attorneys to register and pay a registration fee, then an attorney's suspension for failure to comply with Rule VII would not deprive him of any constitutional right to freedom of association.

Plaintiffs also ask this Court to determine defendant's power under state law to enact the rules. This claim is pendent to plaintiffs' constitutional claims. Whether the Court assumes jurisdiction over the pendent state law claim is discretionary. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The Court will defer ruling on the exercise of pendent jurisdiction until after the convening of a three-judge court.

The Court concludes that substantial constitutional questions are presented requiring the convening of a three-judge court in accordance with the provisions of 28 U.S.C. §2281.

WHEREUPON, the Court determines that it will notify the Chief Judge of the Circuit that in its opinion a three-judge court is required in this case.

/s/ JOSEPH P. KINNEARY
United States District Judge

APPENDIX E

Judgment Entry of the District Court

(Filed October 13, 1976)

Civil Action File Nos. C-2-75-743, C-2-75-751, C-2-76-309

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL S. BUSCHBACHER, *et al.*,

vs.

SUPREME COURT OF OHIO, *et al.*,

JUDGMENT

This action came on for consideration before the Court, Honorable Joseph P. Kinneary, and David S. Porter, United States District Judges, and Honorable John W. Peck, Circuit Judge presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that for the reasons set forth in the accompanying Opinion, the Court determines that the motions to dismiss the complaints herein are meritorious and they are therefore GRANTED. These actions are hereby DISMISSED.

APPENDIX F

Notice of Appeal to the Supreme Court of the United States

(Filed November 12, 1976)

Case Nos. C-2-75-743, C-2-75-751, C-2-76-309

Judges:
John W. Peck, Joseph P. Kinneary, David S. Porter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL S. BUSCHBACHER, *et al.*,
Plaintiffs,

vs.

SUPREME COURT OF OHIO, *et al.*,
Defendants.

NOTICE OF APPEAL

Plaintiffs, the Cuyahoga County Bar Association and Crede Calhoun, in the above consolidated actions give notice of appeal to the Supreme Court of the United States from the order of this Court rendered by three Judges, to wit: Judge John W. Peck of the Sixth Circuit Court of Appeals, Judge David S. Porter of the United States Court for the Southern District of Ohio, and Judge Joseph P. Kinneary of the United States Court for the Southern District of Ohio, whereby said Judges denied a permanent injunction against the defendants, the Supreme Court of Ohio and the Chief Justice and Associate Judges of said Supreme Court of Ohio.

The denial of said permanent injunction resulted from an order entered by said Judges on the 13th day of October, 1976 dismissing the complaint of these plaintiffs and the complaints of the plaintiffs in the consolidated actions.

The within appeal is taken pursuant to the provisions of Title 28, Section 1253, of the United States Code.

/s/ EDWIN F. WOODLE
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Cleveland, Ohio 44115

/s/ MORTON B. ICOVE
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Attorneys for Plaintiffs, Cuyahoga County Bar Assoc. & Crede Calhoun

APPENDIX G

Proposed Amendment Of Paragraph 34 Of The Complaint Of The Cuyahoga County Bar Association

The conduct of the defendants in the adoption and enforcement of Rule 7 deprives the plaintiff Association, its members, the plaintiff Calhoun, and the members of the Bar of the State of Ohio of a fair and impartial tribunal having the authority, and the jurisdiction as such, to hear and to determine the Federal and State constitutional issues presented in this complaint.

The absence of impartiality upon the part of the defendants arises by reason of the following:

(a) The rule was adopted and made effective, ex parte, and without the opportunity for any adversary proceedings with respect thereto.

(b) In a conference between representatives of the plaintiff Association and the defendant Chief Justice and one of the defendant Associate Justices relating to the adoption and the proposed enforcement of Rule 7, the defendants expressly indicated their avowed desire and intention not to pursue, or to carry out, the express provisions of the Constitution relating to the raising of revenue.

(c) By the enforcement of Rule 7, the defendants have accumulated a fund of approximately one million dollars, and possibly in excess of that amount, from the members of the Bar of the State of Ohio, unreasonably in excess of any sum either necessary or desirable to accomplish the stated objectives for the imposition of the fee provided by Rule 7.

(d) The defendants have conceded that the purpose of the adoption and enforcement of Rule 7 is to raise revenue, a power which is expressly reserved by the Constitution of Ohio to the Legislature.

(e) All branches of the government of the State, legislative, executive and judicial, are required to provide to the Legislature a budget setting forth the amount of funds required for the operation of the various departments, and the specific sums to be allocated for the performance of each duty undertaken in the course of their performance. The defendants have refused to do so.

(f) Under the law of the State of Ohio, all funds raised for public purposes are required to be paid into the Treasury of the State of Ohio under the control of the Treasurer of State, and no officer, agency or instrumentality of the State, in the absence of express statutory authority, is permitted to create or maintain a fund, particularly so large a fund as that accumulated by the defendants, which remains solely under its control and not in the custody of the Treasurer of State. The defendants have received the sum accumulated by them, as herein set forth, and have caused said sum to be placed in a special fund under the control of the Clerk of the defendant Court and not transmitted to, or in the custody of, the Treasurer of State.

(g) In the imposition, and stated objective of the use of, said fund the defendants have declared, without limitation as to amount, that a substantial portion of said fund will be employed for purposes unrelated to the jurisdiction of the Court and wholly unrelated to the conduct of members of the Bar. In the determination, ex parte, of the validity of Rule 7, and its enforcement, the defendants were well aware of these facts.

(h) Prior to the adoption by the defendants of Rule 7, the defendants caused and instituted widespread publicity not only among the members of the Bar, but to the citizens generally of the State of Ohio, declaring the purpose and the intent of the defendants in raising revenue and the objectives of their proposed enforcement of the

Rule and the use of the funds received. Any determination now or hereafter by the defendants that they in fact had no power or authority to undertake the acts which they have done, or any acknowledgment that such acts were in violation of the power and authority reposed in the defendants under the Constitution of Ohio, would, in the light of the foregoing, constitute a public embarrassment to the Court, and cannot reasonably constitute that Court as an objective and impartial tribunal in the disposition of the important constitutional issues presented.

The total absence of any court within the state court system of the State of Ohio by which the issues raised can be determined in a fair and impartial adversary proceeding, accordingly deprives the plaintiff Association, its members and the plaintiff Calhoun of due process of law and of the equal protection of the law.